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In The

Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,

Respondents.

IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted] Rochester Telephone Corporation, General Electric Company, Otis Elevator Company, American Broadcasting Companies, Inc., Associated Industries of New York, Inc., Empire State Chamber of Commerce, Inc. and The New York Chamber of Commerce & Industry [redacted] and Brief *Amici Curiae*

RUTH B. ROSENBERG
Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, New York 14604

EUGENE D. ULTERINO
GAIL A. KREUSCH
Of Counsel

Daily Record Corporation
Rochester, New York

(3454)

Spaulding Law Printing
Syracuse, New York

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IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Rochester Telephone Corporation, General Electric Company, Otis Elevator Company, American Broadcasting Companies, Inc., Associated Industries of New York, Inc., Empire State Chamber of Commerce, Inc. and The New York Chamber of Commerce & Industry, as *Amici Curiae*

Interest of the Amici Curiae

The question before the Court is whether New York's grant of employer-financed unemployment insurance benefits to strikers is preempted by the National Labor Relations Act, *as amended*, 29 U.S.C. §§ 141 *et seq.* and by the underlying policy of the Act

which guarantees government neutrality in the collective bargaining process. The interest of each of the *amici* in the resolution of this issue is substantial.

In 1974-1975, Rochester Telephone Corporation (hereinafter "RTC"), a publicly held utility having no affiliation with the Bell System, experienced a six-month strike by the Communications Workers of America, Local 1170. After waiting seven weeks, approximately 1,000 of the striking employees applied for and received unemployment insurance benefits from the State of New York. The benefit payments resulted in a drain on RTC's individual unemployment insurance account of $2,291,990. As a result, RTC's unemployment insurance tax rate was increased substantially, and it is estimated that RTC eventually will be required to pay an additional $1,786,357 in unemployment insurance taxes because of the payment of benefits to strikers during the 1974-1975 strike.

In 1969-1970, General Electric Company (hereinafter "GE") experienced a three-month nationwide strike. Upwards of 14,000 of GE's employees in the State of New York applied for and received unemployment insurance benefits during the course of this strike. The benefit payments resulted in a drain on GE's individual unemployment insurance account of approximately $7,700,000. As a result, GE's unemployment insurance tax rate substantially increased. Between October 1, 1970, and September 30, 1974, GE paid an additional $6,224,000 in unemployment insurance taxes as a direct result of the payment of benefits to its striking employees in New York during the 1969-1970 strike.

Between March 30, 1972, and July 8, 1972, Otis Elevator Company (hereinafter "Otis") was subjected to a nationwide strike by its employees represented by the International Union of Elevator Constructors. Between July 1, 1972, and February 7, 1973, Otis was also subjected to a strike by its employees represented by Local No. 1 of the International Union of

Elevator Constructors and employed within a 35-mile radius of the City Hall of the City of New York, except Monmouth, New Jersey, but including all of Long Island. During the course of these strikes, approximately $1,200,000 in unemployment insurance benefits were paid to about 1,000 of Otis's striking employees who were employed in New York State. Otis's unemployment insurance tax rate increased from 1.2 percent in 1972 to 2.7 percent in both 1973 and 1974. As a result, Otis paid approximately $208,000 in increased taxes in 1973 and approximately $240,000 in increased taxes in 1974.

American Broadcasting Companies, Inc. (hereinafter "ABC") was subjected to a strike by approximately 700 of its New York employees from May 19, 1977 to October 1, 1977. ABC brought suit in the Southern District of New York to enjoin the State from paying unemployment insurance benefits to its striking employees and from collecting increased unemployment insurance taxes as a result of any such payments. On June 30, 1977, Judge Cannella granted the employer's motion for a preliminary injunction. *American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ. No. 77-2995 (S.D.N.Y. June 30, 1977) [Judge Cannella's unreported decision is appended hereto].

This determination was appealed by the State of New York to the United States Court of Appeals for the Second Circuit, which stayed Judge Cannella's order so that approximately $564,000 in benefits were paid to ABC's striking employees. That proceeding is now held in abeyance pursuant to an understanding between the State and ABC that, if this Court leaves unaltered the lower court's decision in *New York Telephone Co. v. New York State Department of Labor*, Civ. No. 77-7337 (2d Cir. Nov. 9, 1977), the payment of such benefits will be charged to ABC's account and its unemployment insurance tax rate will be increased accordingly.

GE and Otis presently have pending before the District Courts of the Northern and Southern Districts of New York, respectively, suits to enjoin future payment of unemployment insurance benefits to strikers, and to recoup the excess unemployment insurance taxes which they have paid. RTC has pending before the Unemployment Insurance Division of the New York State Department of Labor an administrative proceeding to recoup the excess contributions paid by it to the Unemployment Insurance Fund as a result of the payment of benefits to strikers. The court actions and the administrative proceeding are being held in abeyance pending the outcome of the case at bar.

Associated Industries of New York State, Inc. (hereinafter "Associated Industries") is a non-profit corporation organized under the laws of the State of New York, where it has served industry since 1914. It has approximately 2,700 member companies with offices and plants in all parts of the State. The membership includes both manufacturing and non-manufacturing firms which together account for billions of dollars in annual business activity.

Empire State Chamber of Commerce, Inc. (hereinafter "Empire") is a not-for-profit corporation organized under the laws of the State of New York. Empire represents local chambers of commerce, business and trade organizations and associations, and individual companies. Its members, located throughout the State, span a broad crosssection of business activity. They are engaged in banking, insurance, commercial, industrial, manufacturing and professional activities, among others.

The New York Chamber of Commerce & Industry (hereinafter "New York Chamber") is a voluntary business association chartered by the State of New York. It is the oldest chamber of commerce in the United States, having been founded in 1768. The current general membership of the New

York Chamber consists of over 2,500 business proprietorships, partnerships and corporations, representing the full spectrum of commerce and industry in New York. This broad membership is comprised of businesses of all sizes engaged in virtually all branches of industry.

The combined membership of Associated Industries, Empire and the New York Chamber employs upwards of 1,000,000 employees in New York State. Virtually all members are covered by the New York State Unemployment Insurance Law, and a substantial number bargain collectively under the National Labor Relations Act. The interest of the organizations and their membership is therefore substantial.

Summary of Argument

The issue whether the granting of unemployment insurance benefits to strikers is preempted by the National Labor Relations Act urgently requires resolution by this Court. That it is of national significance is dramatically underscored by the number of cases currently before the federal courts which deal with the identical generic question.

The two circuit courts which have considered whether Congress intended when it enacted the NLRA to prohibit the states from granting unemployment insurance benefits to strikers have reached different conclusions. While the First Circuit has decided that the relevant legislative history reveals no clear evidence of congressional intent, the Second Circuit has concluded that the same legislative history evidences Congress's intention to leave the States free to regulate in this area. Thus, unless this Court grants Petitioners' application, numerous federal courts will be forced to address the issue with a minimum of guidance.

The Second Circuit Court of Appeals, we submit, has grievously erred in reaching its conclusion. It has inferred from isolated bits of legislative history, without regard for the broad scope of the preemption doctrine formulated by the courts to safeguard rights guaranteed by the NLRA, that Congress intended to permit the States to grant employer-financed unemployment insurance benefits to strikers pursuant to statutes such as New York's.[1] Because the Court's erroneous decision sanctions state legislation which has the potential for seriously undermining the entire process of unfettered collective bargaining that is fundamental to achievement of the NLRA's objectives, it must be reversed.

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[1]Section 592(1) of the New York Labor Law (McKinney 1977) provides for the payment of unemployment compensation to strikers after a "Suspension of accumulation of benefit rights":

> 1. Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Court should grant Petitioners' Application for a Writ of Certiorari.

I.

Because two circuit courts fundamentally disagree as to whether Congress intended when it enacted the National Labor Relations Act to permit the States to grant employer-financed unemployment insurance benefits to strikers, the Supreme Court must clarify the issue in order to guide federal courts confronted with the identical question.

The basic issue presented by the case which Petitioners seek to put before this Court is whether Congress, when it enacted the National Labor Relations Act, *as amended*, 29 U.S.C. §§141 *et seq.* (hereinafter "NLRA" or the "Act") intended to forbid the States from granting unemployment insurance benefits to strikers. Two United States Circuit Courts have examined the issue, but have arrived at inconsistent opinions with respect to its resolution.

The United States Court of Appeals for the First Circuit addressed the question in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 858 and 414 U.S. 879 (1973). After conducting an exhaustive examination of the applicable legislative history, that Court concluded that whether Congress intended to forbid or to allow such regulation by the States is unclear:

> The *most* that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.
>
> *[U]nambiguous Congressional intent is lacking . . .*

Grinnell Corp. v. Hackett, supra at 457 (emphasis supplied).

At least three district courts have found Judge Coffin's analysis to be well-reasoned and have reached the same conclusion. *See American Broadcasting Companies, Inc. v. New York State Department of Labor*, Civ. No. 77-2995 (S.D.N.Y. June 30, 1977) (Appendix) as well as *New York Telephone Co. v. New York State Department of Labor*, 434 F.Supp. 810 (S.D.N.Y. 1977); *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975); *Dow Chemical Co. v. Taylor*, 57 F.R.D. 105 (E.D. Mich. 1972).

The United States Court of Appeals for the Second Circuit in *New York Telephone Co. v. New York State Department of Labor*, Civ. No. 77-7337 (2d Cir. Nov. 9, 1977) (hereinafter *"New York Telco"*) reviewed the very same historical elements examined by the First Circuit in *Grinnell*. Nonetheless, it concluded that Congress "has evinced an intention to leave the States free to regulate in this area." *New York Telco*, slip op. at 13.[2] The Court identified its fundamental disagreement with the First Circuit:

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[2]Furthermore, even though presented with a record detailing the numerous issues of law and fact essential for resolution of the preemption question, the Second Circuit failed to discuss those issues which the Court in *Grinnell* found pivotal to a determination.

Judge Coffin determined in *Grinnell* that since unambiguous congressional intent on the preemption question is lacking, a court must look to whether the payment of unemployment insurance benefits to strikers palpably infringes upon federal labor policy and whether the state interest in providing those benefits is sufficient to outweigh any such infringement. *Grinnell Corp. v. Hackett*, 475 F.2d 449, 457 (1st Cir. 1973). Because the Court could not adequately examine those issues on the basis of the record before it, it reversed the dismissal of the plaintiff's complaint and remanded the case for further proceedings consistent with its determination. *Grinnell Corp. v. Hackett*, *supra* at 461.

Although the Court of Appeals in the case at bar failed to discuss the issue whether the payment of unemployment insurance benefits to strikers impacts upon the collective bargaining process, it accepted the fact that a "conflict" between the challenged statute and federal labor policy exists. *New York Telco*, slip op. at 13; *see* Point III *infra*.

> Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *Grinnel Corp. v. Hackett*, 475 F.2d 449, 454-57 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973); *Hawaiian Telephone Co. v. Hawaii Department of Labor & Industrial Relations*, 405 F.Supp. 275, 286 (D. Hawaii 1976). We do not agree.

New York Telco, slip op. at 5-6.

As previously indicated, the United States District Court for the District of Hawaii, after reviewing the salient legislative history, agreed with Judge Coffin's conclusion in *Grinnell* that evidence indicating whether Congress intended to allow the states to provide unemployment insurance benefits for strikers is lacking. *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975), *appeals docketed*, Civ. Nos. 76-1584, 76-2056 (9th Cir. Mar. 19, 1976; May 12, 1976) (hereinafter *"Hawaiian Telco"*). Because it was unable to reach a determination on the basis of legislative history, the Court examined the impact of the payment of unemployment insurance benefits on the collective bargaining process. It concluded that the granting of such benefits constitutes an impermissible intrusion upon the unhampered bargaining process guaranteed by the NLRA. Therefore, it found the challenged statute preempted by federal labor policy. *Hawaiian Telco*, *supra* at 290.

Appeals from the Hawaii District Court's Order are now pending before the United States Court of Appeals for the Ninth Circuit. Thus, the Circuit Court is in the unenviable position of being forced to choose between Judge Coffin's analysis in *Grinnell* and Judge Meskill's conclusions in *New York Telco*. If it agrees with the First Circuit, it surely will affirm the District Court's decision; but, if if concludes that the Second Circuit was correct, it must reverse. Regardless of which determination the Ninth Circuit renders, it cannot bind the remaining circuit courts. Only this Court can resolve the disagreement and thus

guide the myriad of tribunals which will be confronted by this question in the future.

II.

The issues presented by this case merit the attention of the United States Supreme Court.

This Court in the past has closely attended to preemption issues, and has consistently confirmed its intent to safeguard the federal law of labor-management relations from state interference. See Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) and cases cited therein. Moreover, in recent years it has rendered decisions on related issues and has carefully reserved for future consideration the question presented herein. *See, e.g., Ohio Bureau of Employment Services v. Hodory*, 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton v. Francis*, 45 U.S.L.W. 4768, 4770 n.7 (June 21, 1977); *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974).

The central issue in *New York Telco* is one of national significance, for it involves the time-honored and pervasive doctrine of federal labor law preemption. If the disputed New York statute is allowed to stand, the collective bargaining process which is fundamental to achievement of the NLRA's purposes will continue to be eroded by union utilization of unemployment insurance benefits as a source of strike support. This case, which includes a record amply detailing the impact that the payment of such benefits to strikers has upon the collective bargaining process, presents the Court with an excellent vehicle for resolution of its underlying issue.

The importance of the issue which Petitioners seek to put before the Court is dramatically underscored by the number of current cases involving the very issue here presented. *See Grinnell Corp. v. Hackett, supra; Hawaiian Telco, supra;*

Dow Chemical Co. v. Taylor, supra; American Broadcasting Companies, Inc. v. New York State Department of Labor, supra; Shell Oil Co. v. Brooks, Civ. No. 74-1935 (W.D. Wash.); *Otis Elevator Co. v. New York State Department of Labor*, Civ. No. 75-6463 (S.D.N.Y.); *General Electric Co. v. New York State Unemployment Insurance Fund*, Civ. No. 75-602 (N.D.N.Y.); *Hawaii Employers Council v. State of Hawaii Department of Labor and Industrial Relations (Pearl Harbor Federal Credit Union)*, Civ. No. 74-262 (D. Hawaii); *Hawaii Employers Council v. State of Hawaii Department of Labor and Industrial Relations (Edward D. Sultan Co.)*, Civ. No. 74-285 (D. Hawaii); *Westinghouse Broadcasting Co. v. Massachusetts*, Civ. No. 76-1409-S (D. Mass.); *Eagle Electric Manufacturing Co. v. New York State Department of Labor*, Civ. No. 77-3925 (S.D.N.Y.); *Jarl Extrusions, Inc. v. Ross*, Civ. No. 77-412 (W.D.N.Y.); *Ford Aerospace and Communications Corp. v. State of Hawaii Department of Labor and Industrial Relations*, Civ. No. 75-44 (D. Hawaii); *Mail-Well Envelope Co. v. State of Hawaii Department of Labor and Industrial Relations*, Civ. No. 75-131 (D. Hawaii); *Spargo Wire Co. v. New York State Unemployment Insurance Fund*, Civ. No. 77-520 (N.D.N.Y.).

III.

Congress has not demonstrated an intention to allow the States to grant unemployment insurance benefits to strikers and thus to disrupt the balance of economic power which lies at the heart of the collective bargaining process.

Analytic inquiry into the question whether a state statute which grants unemployment insurance benefits to strikers conflicts with federal law requires an examination of the judicial doctrine of labor law preemption which has evolved since enactment of the NLRA. Curiously, the Second Circuit based its opinion in the case at bar primarily upon a federal statute other than that which governs the field of labor-management relations. Because it failed to review legislative history against

the sweeping federal policy favoring zealous protection of the collective bargaining process, the Court of Appeals made a fundamental error in reaching its determination to uphold the New York statute.

The preemption doctrine teaches that because economic warfare is so fundamental a part of the bargaining process, the NLRA envisions a "free play of economic forces" which simply is not subject to state regulation. *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976); *see NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). It is beyond cavil, and indeed is not seriously disputed by either Respondents or the Court below, that the record in the case at bar clearly demonstrates the significant influence upon collective bargaining exerted by the payment of unemployment insurance benefits to striking employees.[3] Direct subsidy for strikers provides a negotiating union's membership with the financial means to refrain from returning to work before their demands at the bargaining table are met, and at the same time, since the subsidy is financed with the struck employer's funds, it saps strength from the employer's economic

[3]In a related case, this Court took judicial notice of the overwhelming influence upon collective bargaining of payments made to strikers through welfare assistance programs:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of laws. . . .

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974). Unemployment insurance benefits have an even more substantial financial impact upon the employer's position than do welfare benefits, for the former are available as of right to all strikers while the latter are granted only on the basis of need.

force by substantially increasing the costs associated with the strike.[4] Management negotiators are motivated by the unemployment insurance scheme to accede to union demands before the strikers' benefits begin to accumulate, causing the employer's insurance fund to be depleted and insurance contribution rates to rise.[5] Thus, the challenged New York statute acts as a double-edged sword against a negotiating employer, at one time both draining from management's stength and enhancing labor's.

As Professor Cox so aptly pointed out in his most recent article on labor law preemption:

> [W]here the state law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes . . . the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress *is so great as to require exclusion of state law unless Congress has provided otherwise.*

Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972) (emphasis supplied). The Second Circuit recognized that the challenged New York statute "is based upon an accommodation of the special interests of employers [and] unions . . . in . . . collective bargaining," for it cited the "conflict" between the state law and the broad federal policy of

[4]New York Labor Law Section 592(1) (McKinney 1977) grants strikers unemployment insurance benefits after a seven-week suspension period. Benefit payments are made from an unemployment insurance fund which, under New York Labor Law Section 570(1), is financed by the struck employer.

[5]An employer's experience rating determines the amount of its contributions to the fund. The rating has as its basis the sum remaining in the employer's individual account at the end of a year after contributions are credited and benefits paid are debited.

free collective bargaining. Yet, notwithstanding the magnitude of the conflict, the Court determined that "[it] is one which Congress has decided to tolerate." *New York Telco*, slip op. at 13.

The Court positively inferred from Congress's failure in Title IX of the Social Security Act of 1935, *as amended*, 42 U.S.C. §§501 *et seq.*[6] to expressly prohibit the payment of unemployment insurance benefits to strikers that Congress intended to tolerate the conflict between statutes permitting such payments and national labor policy. In interpreting the relevant legislative history to reach this conclusion, however, the Court committed three fundamental errors: (1) it incorrectly applied the maxim *expressio unius est exclusio alterius* to the Social Security Act provision relied upon; (2) it placed unwarranted reliance upon congressional inaction to infer congressional intent; and (3) it allowed a subsequently enacted statute of general import, to wit, the Social Security Act, to impliedly repeal a statute of specific import, the NLRA.

The Second Circuit assumed from Congress's painstaking specification of certain individuals to whom the States cannot deny benefits that it must have intended to allow the States to grant benefits to strikers. If it had intended to do so, the Court apparently reasoned, Congress could — and would — have expressly proscribed the granting of such benefits. The Court's application of the *expressio unius est exclusio alterius* doctrine, however, was incorrect because the Social Security Act identified only those who should be *entitled* to unemployment insurance benefits, and not those who should be *denied* benefits.

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[6]The Act is now known as the Federal Unemployment Tax Act, 26 U.S.C. §§3301-09.

In addition, the Court was persuaded by Congress's *failure* to expressly prohibit the payment of unemployment insurance benefits to striking employees that it intended to allow the States to grant such benefits. Such reliance upon congressional inaction to infer congressional intent is clearly unjustified. As this Court has repeatedly noted:

> [N]onaction by Congress affords the most dubious foundation for drawing positive inferences . . . . Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.

United States v. Price, 361 U.S. 304, 310-13 (1960). *See also Zuber v. Allen*, 396 U.S. 168, 185 (1969); *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

Finally, in placing such emphasis upon the Social Security Act, the Court appears to have violated a cardinal rule of statutory construction that a subsequently enacted statute of general import cannot impliedly repeal an earlier enactment of specific import. *See United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). The NLRA specifically addresses itself to the collective bargaining process and the States' role therein. The Social Security Act, on the other hand, does not address that process at all. Yet, the Second Circuit allowed Congress's failure to prohibit the benefit payments now is dispute when it enacted the Social Security Act to create an exception to the rule that the States may not interfere in the collective bargaining process.

The Second Circuit cited *Ohio Bureau of Employment Services v. Hodory*, 45 U.S.L.W. 4544 (May 31, 1977) (hereinafter *"Hodory"*), to support the inferences which it drew from the Social Security Act. However, the Court's reliance upon *Hodory* was misplaced. As the Second Circuit itself has noted, this Court in *Hodory* specifically declined inquiry into the preemptive effects of the NLRA upon the disputed statute, presumably leaving that issue for a case such as the one at bar. *New York Telco*, slip op. at 7 n.3, *citing Hodory*, *supra* at 4545 n.3.

Moreover, even if this Court had declared in *Hodory* that the Ohio statute was not preempted by the NLRA, the issue in this case would not be decided. A statute such as Ohio's, which *bars* the payment of unemployment insurance benefits to strikers, does nothing more than maintain the neutrality required by the Act. It reinforces — and is therefore compatible with — the principle of free collective bargaining which underlies the federal law of labor-management relations. Indeed, as this Court pointed out in *Hodory*, the disqualification in the Ohio statute was at least in part justified by the State's desire to remain neutral in labor disputes. *See Hodory*, *supra* at 4550.

CONCLUSION

For the foregoing reasons, and for those put forth in the petition for certiorari pending before the Court, we respectfully submit that the Court should issue a writ of certiorari to the Second Circuit Court of Appeals in order that it may hear, and decide, the issue whether the NLRA and its underlying policies preempt state laws providing unemployment insurance benefits to strikers at the expense of their struck employers.

Dated: January 10, 1978

Respectfully submitted,

RUTH B. ROSENBERG
Nixon, Hargrave, Devans & Doyle,
Lincoln First Tower
Rochester, New York 14604
Telephone: (716) 546-8000

EUGENE D. ULTERINO
GAIL A. KREUSCH
Of Councel

APPENDIX

DECISION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN BROADCASTING COMPANIES, INC.,
Plaintiff,

—against-

NEW YORK STATE DEPARTMENT OF LABOR; LOUIS L. LEVINE, Industrial Commissioner of the New York State Department of Labor; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; and JAMES H. TULLY, JR., State Commissioner of Taxation and Finance,
Defendants.

77 Civ. 2995
(JMC)

CANNELLA, D.J.:

Motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, restraining the defendants from paying unemployment insurance benefits to plaintiff's striking employees, is hereby granted.

On May 17, 1977 the engineers employed by plaintiff, the American Broadcasting Companies, Inc. ["ABC"], went on strike. These engineers are represented by the National Association of Broadcast Employees and Technicians ["NABET"]. Pursuant to § 592(1) of the New York State Unemployment Insurance Law, these striking employees will be eligible for unemployment benefits on July 5, 1977 and expect to begin receiving weekly checks shortly after July 12, 1977. Although unemployment checks are distributed by the State, the expense is actually borne by the employers who maintain accounts upon which vouchers are drawn for this purpose.

ABC, relying upon Judge Owen's recent Opinion in New York Telephone Co. v. New York State Department of Labor ["Telco"], 73 Civ. 4557 (S.D.N.Y. May 24, 1977), claims that the payment of unemployment benefits to strikers is pre-empted by federal labor policy. While not wholly adopting Judge Owen's reasoning and conclusions, the Court finds that plaintiffs are entitled to preliminary injunctive relief. Because of the *Telco* case, a decision after trial upon an extensive record, the instant controversy raises "sufficiently serious questions going to the merits to make them a fair ground for litigation . . . ." Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973). Additionally, ABC has established that the irreparable injury it has suffered tips the balance of hardships decidedly in its favor. Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 440-41 (2d Cir. 1977); Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976); *Sonesta Int'l Hotels Corp., supra.*

In *Telco*, Judge Owen labelled "a fundamental truism [sic] [the fact] that the availability to, or expectation or receipt of a substantial weekly, tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals." *Telco, supra* slip op. at 7 (footnotes omitted). The evidence at trial was found by Judge Owen to confirm this truism. Based upon this finding, he concluded that the New York law authorizing such payments conflicts with the federal policy of free collective bargaining and is thus invalid under the Supremacy Clause of the Constitution. In an order signed June 24, 1977, Judge Owen enjoined enforcement of the Unemployment Insurance Law "to the extent that it provides for the payment of unemployment compensation to strikers . . ." *Telco*, Declaratory Judgment and Order for Permanent Injunction, slip op. at 2. (S.D.N.Y. June 24, 1977). Circuit

Judge Mansfield granted the *Telco* defendants, who are also the defendants herein, a temporary stay of Judge Owen's order pending argument on the motion for a stay pending appeal scheduled for June 30, 1977. Although denial of a stay of the extremely broad *Telco* order would operate to give ABC the relief it seeks in the instant action, the granting of a stay would not preclude this Court from issuing an injunction specifically directed at the ABC strikers.

The legal issues involved in this case are unsettled. The *Telco* decision apparently represents the first time a court in this district has spoken on the question whether federal labor policy pre-empts § 592(1). Defendants contend that the Supreme Court's dismissal for want of a federal question in Kimbell, Inc. v. Employment Security Commission of New Mexico, 429 U.S. 804 (1976), as well as its opinion in Ohio Bureau of Employment Services v. Hodory, 45 U.S.L.W. 4544 (U.S. May 31, 1977), renders *Telco* erroneous. However, the basis for the *Kimbell* decision is anything but clear, *compare* Super Tire Engineering Co. v. McCorkle, 550 F.2d 903 (3rd Cir. 1977), *with* Dow Chemical Co. v. Taylor, No. 38644 (E.D. Mich. Feb. 9, 1977), and the precise pre-emption issue involved herein was specifically left unresolved in *Hodory*, see 45 U.S.L.W. at 4545 n.3. The issue is further beclouded by the fact that the state unemployment statutes construed by courts in other jurisdictions differ from the New York scheme regarding eligibility requirements for striking employees. *See* Hawaiian Tel. Co. v. Hawaii Dep't of Labor, 405 F. Supp. 275 (D. Hawaii 1975); Albuquerque-Phoenix Express, Inc. v. Employment Security Comm'n, 544 P. 2d 1161 (N.M. 1975).

In spite of the above uncertainty, this Court agrees with Judge Owen that the expectation of unemployment benefits is a significant factor in prolonging a strike. This being the case, a substantial question arises as to whether the State, in providing

such benefits for striking employees, is in conflict with the federal labor policy of free and unhampered collective bargaining. Conflicting inferences may be drawn from the legislative history accompanying the federal labor laws such that congressional intent is difficult to fathom. *See, e.g.*, Grinnell Corp. v. Hackett, 475 F.2d 449, 454-57 (1st Cir. 1973), *cert. denied*, 414 U.S. 858, 879 (1973).

Having found that plaintiff presents a substantial question going to the merits, a preliminary injunction will issue if, without such relief, plaintiff may suffer irreparable harm decidedly greater than that suffered by the defendant under the injunction. In this regard, defendant has produced absolutely no affidavits or other evidence indicating the injury sufferable by reason of an injunction. The Court, of course, realizes that the striking employees will suffer the loss of weekly unemployment checks; in that unemployment benefits are not distributed on a "need" basis, however, the Court is unable to speculate as to the grievousness of this loss.[1]

By contrast, ABC has submitted affidavits indicating the irreparable injury it has suffered, and will continue to suffer, while the strike continues. Based upon the Court's finding that the expectation of unemployment benefits operates to lengthen the duration of the strike, the injury suffered by virtue of the strike is caused, at least in part, by the State's enforcement of § 592(1).

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[1]The Court at this time expresses no opinion as to whether NABET, as representative of the striking employees, is an indispensable party to this action. See Fed. R. Civ. P. 19. However, the Court will entertain a motion by NABET to intervene if the union deems such action necessary in order to protect its interest and the interest of its members in the pending litigation. For this reason, plaintiff is hereby directed to serve a copy of this decision on the union by Tuesday, July 5, 1977.

According to Julius Barnathan, the President of Broadcast Operations and Engineering of ABC, plaintiff has been forced to reduce its in-studio production and its coverage of news and major sporting events. For example, the May 23, 1977 baseball game between New York and Boston was not televised due to pressure applied to Yankee management by the union. Barnathan further stated that the limited non-union manpower has caused ABC to cease servicing an independent company that provides syndicated news to foreign broadcasters. Additionally, the broadcast of sporting events during this period has suffered technically.

According to Nicholas Archer, Vice President of Television News Service of ABC News, the strike has caused ABC "to lose most of its Electronic News Gathering ["ENG"] capabilities utilizing hand-held portable electronic tape and live cameras, and is instead relying almost exclusively on film cameras. This substitution prevents ABC from broadcasting stories breaking shortly before air time, and no longer gives ABC the ability to transmit live stories from the field during the course of news broadcasts or emergency bulletins." Archer Affidavit ¶ 3. The strike has prevented ABC from covering significant news stories such as President Carter's speech before the United Auto Workers Union and the terrorist attack on the Yugoslav Mission in New York City. ABC's cutting back on its late night news syndication may very well result in loss of goodwill from subscribers.

Hand in hand with the injury suffered by ABC is the harm caused to the public at large by the reduction in services of a major television network. As stated by Barnathan, "Any information or material which ABC is prevented from covering in its entirety can never be retrieved and presented to the public in a timely manner." Barnathan Affidavit ¶ 13.

In addition to the above, the payment of benefits to the ABC strikers will reduce plaintiff's insurance fund by approximately $66,500/week. Although Judge Owen ruled that the eleventh amendment does not bar a suit by an employer to recover these monies from the State, *Telco*, slip op. at 36-37, that issue will be hotly contested on appeal. It is therefore possible that, should the Second Circuit agree with Judge Owen on the pre-emption issue, ABC will still be unable to recover the amounts drawn on its fund account.

In contrast to the defendants' failure to establish any injury on their part should the injunction issue, plaintiff has shown that without an injunction they will suffer irreparably. Hence, the balance of hardships tips decidedly in plaintiff's favor. *See, e.g., Sonesta Int'l Hotels Corp., supra.* Having met the standard for the issuance of a preliminary injunction, plaintiff's motion is hereby granted.

Accordingly, the defendants are hereby enjoined from making payments to, as well as from implementing any of the provisions of the New York Unemployment Insurance Law authorizing or requiring them to make payments to, the striking employees of ABC.

The foregoing constitute the findings of fact and conclusions of law of the Court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

SO ORDERED.

/s/ JOHN M. CANNELLA
John M. Cannella
United States District Judge

Dated: New York, N.Y.
June 30, 1977.